Supreme Court, U.S.
FILED

No. 02 152 JUL 26 2002

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IN THE

Supreme Court of the United States

LOIS E. MARX,

Petitioner,

V.

MERIDIAN BANCORP, INC., LONG TERM DISABILITY PLAN; JOHN DOES 1-10; IN THEIR CAPACITIES AS MEMBERS OF THE ADMINISTRATIVE COMMITTEE ON EMPLOYEE BENEFIT PLANS (AKA THE BENEFITS DESIGN COMMITTEE); METROPOLITAN LIFE INSURANCE COMPANY; CORESTATES FINANCIAL CORPORATION,

Respondents.

On Petition for Writ of Certiorari
To The Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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4589

QUESTION PRESENTED

1. In an action for long-term disability benefits under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.*, does *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), require that a decision to terminate benefits be reviewed *de novo*, rather than under the deferential arbitrary and capricious standard, when the entity that made the decision is not an ERISA fiduciary and, therefore, did not have any fiduciary obligation to the beneficiary?

2. Did the United States Court of Appeals for the Third Circuit err when it held that "there is no requirement in the jurisprudence of either the Supreme Court or this Court that limits the deferential standard of review to ERISA fiduciaries?"

PARTIES TO THE PROCEEDINGS

All named parties to the proceedings have been included in the caption of the case.

Petitioner:	Lois E. Marx, an individual.
Respondents:	Meridian Bancorp, Inc. Long Term Disability Plan; John Does 1-10, in Their Capacities as Members of the Administrative Committee on Employee Benefit Plans (aka the Benefits Design Committee); Metropolitan Life Insurance Company; CoreStates Financial Corporation

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IN THE
SUPREME COURT OF THE UNITED STATES

LOIS E. MARX,

Petitioner,

v.

MERIDIAN BANCORP, INC., LONG TERM DISABILITY PLAN; JOHN DOES 1-10; IN THEIR CAPACITIES AS MEMBERS OF THE ADMINISTRATIVE COMMITTEE ON EMPLOYEE BENEFIT PLANS (AKA THE BENEFITS DESIGN COMMITTEE); METROPOLITAN LIFE INSURANCE COMPANY; CORESTATES FINANCIAL CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

LOIS E. MARX, Petitioner, by undersigned counsel, under appropriate rules of this Court, requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

This dispute arose as a result of the termination of Petitioner Lois E. Marx's ("Marx") long-term disability benefits by Metropolitan Life Insurance Company ("MetLife"), the non-fiduciary that the Meridian Bancorp Inc. Long-Term Disability Plan (the "Plan") had designated to administer benefits subject to the direction and control of Bancorp's Administrative Committee, the Plan Administrator. After exhausting her administrative remedies, Marx filed suit in the United States

District Court, Eastern District of Pennsylvania, for the restoration of benefits under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.*

On June 20, 2002, the district court granted summary judgment for the defendants, applying the highly deferential "arbitrary and capricious" standard of review to MetLife's decision. The unofficial citation for the district court's decision is *Marx v. Meridian Bancorp, Inc. Long Term Disability Plan*, 2001 WL 706280 (E.D.Pa. Jun 20, 2001)(NO. CIV. A. 99-CV-4484).

Marx appealed to the United States Court of Appeals for the Third Circuit. On March 27, 2002, the Third Circuit affirmed the district court's decision, holding that "there is no requirement in the jurisprudence of either the Supreme Court or this Court that limits the deferential standard of review to ERISA fiduciaries." The unofficial citation for the appellate court's decision is *Marx v. Meridian Bancorp, Inc. Long Term Disability Plan*, 32 Fed.Appx. 645, 2002 WL 471248 (3rd Cir.(Pa.), Mar 27, 2002)(NO. 01-2918).

On April 10, 2002, Marx timely requested a rehearing of the appellate court's decision or a hearing *en banc*. The United States Court of Appeals for the Third Circuit denied Marx's Petition on April 30, 2002, with Chief Judge Becker noting that he would have granted rehearing.

JURISDICTION

Subject matter jurisdiction for Marx's claim in the District Court is found in the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132(e) and (f) and 28 U.S.C. § 1331.

Subject matter jurisdiction for Marx's appeal to the United States Court of Appeals for the Third Circuit is found in 28 U.S.C. § 1291.

Petitioner Marx invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

Employees Retirement Income Security Act of 1974
29 U.S.C. § 1132(a)(1)(B) and 1132(a)(3)

§ 1132 Civil enforcement
(a) Persons empowered to bring a civil action

A civil action may be brought —

(1) by a participant or beneficiary —

. . . . .

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

. . . . .

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provision of this subchapter or the terms of the plan;

STATEMENT OF THE CASE

A. Marx's Benefits Under the Plan Were Terminated by the Decision of a Non-Fiduciary Administrator and Were Never Reviewed by an ERISA Fiduciary.

While employed at Meridian Bancorp, Inc. ("Meridian"), Marx suffered a disabling back injury. She received benefits under Meridian's long-term disability plan for two years. After two years, the Plan's Claims Administrator, MetLife, determined she was no longer eligible for benefits.

Under the terms of the Plan, MetLife was not a Named Fiduciary as defined by ERISA. *See* 29 U.S.C. § 1102(a). The Administrative Services Agreement between MetLife and Meridian expressly defined MetLife's role as that of a non-fiduciary administrator: "Metropolitan acts solely as an agent of Meridian Bancorp, Inc. and/or Administrative Committee and not as a fiduciary as that term is defined under the Employee Retirement Income Security Act of 1974 ('ERISA')." [Emphasis added].

It is undisputed that, during the entire process of MetLife's review of Marx's continued eligibility for benefits and during all administrative appeals, MetLife acted totally on its own, never consulting with nor receiving input or guidance from any ERISA fiduciary. Moreover, MetLife never submitted its decision to any ERISA fiduciary, such as the Plan Administrator, for review. This was despite the fact that the Plan provided that the participant was entitled to have "... the Plan Administrator . . . arrange and supervise a full review of the claim . . . ." [Emphasis added.]

Upon a second appeal by Marx through her attorney, MetLife confirmed its belief that it had no fiduciary obligation to Marx, saying it "did not have fiduciary responsibility under this Plan." [Emphasis added]. After this determination,

MetLife rejected a review of Marx's second appeal as unnecessary and reiterated that its decision to terminate Marx's benefits was proper. As it had previously, MetLife made this decision about Marx's second appeal without consulting the Plan Administrator or other ERISA fiduciary.

B. The United States District Court Approved MetLife's Decision under the Deferential Arbitrary and Capricious Standard.

Following MetLife's final decision, Marx filed suit in the United States District Court, Eastern District of Pennsylvania, asking that the court restore her benefits pursuant to 29 U.S.C. § 1132(a). As is often the case in ERISA matters, whether the district court should apply a *de novo* standard of review to MetLife's decision to terminate Marx's benefits or the more deferential "arbitrary and capricious" standard of review was a critical issue.

The district court applied the "arbitrary and capricious" standard of review and entered summary judgment for defendants. In its opinion, the district court acknowledged that the Plan did "not contain a direct grant of authority to MetLife." It also acknowledged that the Administrative Services Agreement governing MetLife's responsibilities vis-a-vis the Plan said that MetLife "acts solely as an agent of Meridian Bancorp, Inc. and/or The Administrative Committee and not as a fiduciary as that term is defined under the Employee Retirement Income Security Act of 1974." Despite this, the district court found that the deferential "arbitrary and capricious" standard of review applied to MetLife's decision because the Plan allowed for hiring a Claims Administrator and because MetLife's responsibilities as defined by the Administrative Services Agreement implied a grant of discretionary authority to MetLife over Plan benefits decisions, notwithstanding the express language to the contrary contained in the Administrative Services Agreement.

C. *The Third Circuit Affirmed the District Court's Decision, Holding that Deferential Review Could be Afforded to Decisions of Non-ERISA Fiduciaries.*

The Third Circuit affirmed the district court's decision, holding that deferential review standard of review was not limited to entities with fiduciary responsibility under ERISA. The Court of Appeals also held that the Plan language was "clear on its face in granting discretionary authority to MetLife to determine eligibility for LTD benefits under the Meridian Plan," thereby ignoring the express agreement to the contrary between Meridian and MetLife.[1]

On April 10, 2002, Marx filed a Petition for Panel Rehearing and Hearing *En Banc* with the United States Court of Appeals for the Third Circuit. On April 30, 2002, the appellate court issued an order denying Marx's Petition, with Chief Judge Becker stating that he would have granted rehearing.

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[1] Contrary to the lower courts' findings, the Meridian Plan language itself supports Marx's position that MetLife was a non-fiduciary with no discretionary authority over benefits determinations. Along with the other provisions defining MetLife's role as Claims Administrator, the Plan said that "[t]he Plan Administrator will arrange and *supervise* a full review of the claim by the Claims Administrator...." "Supervise" typically means to oversee, to guide, to direct and inspect the performance of a subordinate, assuring a result that performance is acceptable to the supervisor. This interpretation of "supervise" is entirely consistent with the Administrative Services Agreement's unambiguous provisions that expressly stated (1) that MetLife was not an ERISA fiduciary, and (2) that MetLife's decisions would be subject to "full and fair review" by the Plan Administrator.

REASONS FOR GRANTING WRIT

BY DEFERENTIALLY REVIEWING UNDER THE ARBITRARY AND CAPRICIOUS STANDARD THE DECISION OF ONE WHO WAS NOT AN ERISA FIDUCIARY, THE COURT OF APPEALS FOR THE THIRD CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH BOTH THE LANGUAGE AND THE TRUST LAW RATIONALE THAT FORMS THE UNDERPINNING OF THE ANALYSIS IN *FIRESTONE TIRE & RUBBER CO. v. BRUCH*, 489 U.S. 101 (1989), AND WITH DECISIONS OF OTHER COURTS OF APPEAL ON THE SAME IMPORTANT MATTER.

Based on this Court's decision in *Firestone*, 489 U.S. 101, and the fiduciary principles inherent in the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.*, the decision of an entity who has neither the authority nor the discretion to terminate an ERISA plan participant's benefits and who is expressly acknowledged not to be an ERISA fiduciary should be subject to the default *de novo* standard of review established in *Firestone*.

It is undisputed that MetLife made the decision to terminate Marx's benefits. It is undisputed that neither the Plan nor any independent writing granted MetLife the authority or the fiduciary status necessary to make a discretionary decision regarding Marx's benefits. It is undisputed that the Administrative Services Agreement that designated MetLife as the Claims Administrator explicitly stated that MetLife was not an ERISA fiduciary and was not to exercise discretionary authority. Both the Plan language and the Administrative Services Agreement required MetLife to act under the supervision of the Plan Administrator, who was an ERISA fiduciary. Despite all these clear indications that MetLife had no fiduciary responsibility toward Marx, the courts below

incorrectly applied the deferential "arbitrary and capricious" standard of review to MetLife's decision to terminate Marx's benefits instead of correctly applying the default *de novo* standard of review.

A. *Under ERISA Law, Which Is Based on Trust Law Principles, Only Decisions by a Fiduciary Should Be Granted Deference.*

The purpose of ERISA is to provide safeguards for participants in employee welfare and benefit plans and to promote the interests of employees and their beneficiaries. 29 U.S.C. § 1001(a) and *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 90 (1983). To this end, this Court has applied trust law principles to ERISA plans. *Firestone*, 489 U.S. at 109-111. Using these trust law principles, the Supreme Court found that *de novo* review is the general rule when a court reviews benefits determinations and that deferential review is the exception, with the burden on the Plan to show that the challenged decision is entitled to deference. *Firestone*, 489 U.S. at 115.

The concept of deferential review is a direct offshoot of the concept of fiduciary responsibility. Based on the principles discussed in *Firestone*, deferential review should apply only to a fiduciary's decisions because the high duty of loyalty to and care toward plan participants and beneficiaries acts as a constraint on a fiduciary's discretion. *Firestone*, 489 U.S. at 110-11; *see also Pinto v. Reliance Standard Life Insurance Company*, 214 F.3d 377, 389 (3d Cir. 2000)("'the basis for the deferential standard for review in the first place was the trust nature of most ERISA plans,'" citing *Brown v. Blue Cross and Blue Shield of Ala.*, 898 F.2d 1556, 1561 (11th Cir. 1990), quoting *Moon v. American Home Assurance Co.*, 888 F.2d 86, 89 (11th Cir. 1989)), *see also, e.g., Harte v. Bethlehem Steel Corporation*, 214 F.3d 446 (3d Cir. 2000); *Joyce v. RJR Nabisco*

Holdings Corp., 126 F.3d 166 (3d Cir. 1997); *Gritzer v. CBS, Inc.*, 275 F.3d 291 (3d Cir. 2002).

Conversely, trust law does not support a grant of deference to the decisions of non-fiduciaries, who have no corresponding fiduciary obligations to plan beneficiaries. *See Varity Corporation v. Howe*, 516 U.S. 489, 504 (1996)("Indeed, the primary function of the fiduciary duty is to constrain the exercise of discretionary powers which are controlled by no other specific duty imposed by the trust instrument or the legal regime") and *Bixler v. Central Pennsylvania Teamsters Health & Welfare Fund*, 12 F. 3d 1292, 1299 (3d Cir. 1993)("In the words of Justice Brennan, the fundamental purpose of [ERISA] is the 'enforcement of strict fiduciary standards of care in the administration of all aspects of pension plans and promotion of the best interests of participants and beneficiaries.'")

As stated by this Court in *Firestone*, 489 U.S. at 111, "[t]rust principles make a deferential standard of review appropriate when a trustee exercises discretionary powers" (citing *Restatement (Second) of Trusts*, § 187). This Court recently implicitly reinforced this concept when it stated in *Rush Prudential HMO, Inc. v. Moran*, ___ *U.S.* ___, 122 S.Ct. 2151, 2169 (2002), that "...*Firestone* ..., recognized that an ERISA plan could be designed to grant "discretion" to a *plan fiduciary*, deserving deference from a court reviewing a discretionary judgment...." [Emphasis added.] For this reason, only a fiduciary's decisions should be granted deference and reviewed under the "arbitrary and capricious" standard; decisions by non-fiduciaries must be reviewed *de novo*. *See Baker v. Big Star Division of the Grand Union Co.*, 893 F.2d 288, 291-2 (11th Cir. 1990), *Sharkey v. Ultramar Energy Limited*, 70 F.3d 226, 229-230 (2nd Cir. 1995).

B. *The Lower Courts Incorrectly Applied a Deferential Standard of Review to a Non-Fiduciary's Decision to Terminate Benefits.*

By deferring to non-fiduciary MetLife's decision to terminate Marx's benefits, the courts below have established precedent that, if not reversed, will undermine the trust law principles inherent in ERISA and the protections those principles afford to participants and beneficiaries. In its opinion, the Third Circuit held that, "there is no requirement in the jurisprudence of either the Supreme Court or this Court that limits the deferential standard of review to ERISA fiduciaries." To support its decision, the Third Circuit stated that "*Firestone* explicitly instructed that a Benefit Plan may confer discretionary authority sufficient to trigger the deferential standard of review on either a fiduciary *or* an administrator."[2]

This reasoning subverts the principles of trust law upon which the Supreme Court relied in *Firestone*. Non-fiduciaries have no duty to act in the best interest of beneficiaries. Non-fiduciaries, with no duty of loyalty to beneficiaries, are legally free to base their decisions on other factors, including their own self-interest, without risk of liability. They will be even

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[2] If MetLife had been properly designated a fiduciary or had been properly granted discretionary powers, the discretionary standard of review might have been appropriate. *See, e.g., Madden v. ITT Long Term Disability Plan for Salaried Employees,* 914 F. 2d 1279, 1283-84 (9th Cir. 1990); *Rodriguez-Abreau v. Chase Manhattan Bank, N.A.,* 986 F. 2d 580, 584 (1st Cir. 1993). In fact, the opposite occurred. MetLife and the Plan stated, in writing, that MetLife was to act ". . . solely as an agent of Meridian Bancorp, Inc. and/or the Administrative Committee and not as a fiduciary as that term is defined under [ERISA]."

more free to do so if they know that their decisions will be subjected only to the deferential "arbitrary and capricious" standard of review in court.

The reliance that the courts below placed on the phrase "fiduciary or administrator" in *Firestone* to support their conclusion that *Firestone* authorized granting deference under ERISA to the decisions of non-fiduciary administrators is especially disturbing. Unlike MetLife, the "administrator" to whom the Supreme Court referred in *Firestone* was an ERISA fiduciary. In *Firestone*, the Supreme Court clearly used the phrase "administrator or fiduciary" to mean *Plan* Administrators or *other* ERISA fiduciaries, all of whom are bound by fiduciary obligations under ERISA. *See Nazay v. Miller*, 949 F.2d 1323, 1334 (3d Cir. 1991)("Application of this [arbitrary and capricious] standard was buttressed by the fact that Congress had intended to incorporate LMRA fiduciary law into ERISA and that ERISA, like the LMRA, imposes a duty of loyalty on fiduciaries and plan administrators"); *Luby v. Teamsters Health, Welfare, and Pension Trust Funds*, 944 F. 2d 1176, 1181 (3d Cir. 1991)("... the Supreme Court's purpose in Firestone: to insure that when a plan's terms do not confer certain discretionary powers on a *plan trustee*, a trustee's exercise of such discretion is subject to *de novo* review."); *Epright v. Environmental Resources Management, Inc. Health and Welfare Plan*, 81 F. 3d 335, 339 (3d Cir. 1996)("ERISA plans ... are to be administered by fiduciaries ...."); *Kinstler v. First Reliance Standard Life Insurance Company*, 181 F. 3d 243, 249 (2d Cir. 1999)("In *Firestone*, ... the Supreme Court considered the issue of the appropriate standard for judicial review of benefit determinations by fiduciaries or *plan* administrators under ERISA.").

The Second, Sixth and Eleventh Circuits have all interpreted *Firestone's* reference to "administrator" to allow a grant of deferential review only to those administrators who have fiduciary responsibilities. *Sanford v. Harvard Industries,*

262 F.3d 590, 597 (6th Cir. 2001) held that "[w]hen an unauthorized body that does not have *fiduciary* discretion to determine benefits eligibility renders such a decision, however, this deferential review is not warranted." *See also Sharkey*, 70 F. 3d at 229. This concept was perhaps most clearly stated by the Eleventh Circuit in *Baker*, 893 F. 2d at 290-91, when it held that *Firestone*'s "fiduciary or administrator" phrase meant "plan fiduciary" or "plan administrator." In language directly applicable here, the Eleventh Circuit said:

> ... one who is *not* a fiduciary is also *not* "an administrator with discretionary authority" under 29 U.S.C. § 1002(16)(A) and (21)(A). "Administrators" are distinguished from "fiduciaries" by the former's lack of discretionary authority or discretionary control; therefore, any entity or person found not to be an ERISA "fiduciary" cannot be an "administrator with discretionary authority" subject to the arbitrary and capricious standard.

Id. at 291 (emphasis in original).

Before the decision in the case at bar, the Third Circuit had never granted deferential review to a benefits determination by a non-fiduciary administrator. In fact, recently, in *Gritzer*, 275 F.3d at 295-96, the Third Circuit held that *de novo* review is required where the Plan trustee, who was an ERISA fiduciary and who had the power to exercise discretion, made no decision at all, much as occurred in Marx's case. In reaching that decision, the Third Circuit panel relied upon *Moench v. Robertson*, 62 F. 3d 553, 567 (3d Cir. 1995), which in turn relied upon *Trustees of Central States, Southeast and Southwest Areas Health & Welfare Fund v. State Farm Mutual Auto Ins.*, 17 F. 3d 1081, 1083 (7th Cir. 1994)(the deferential standard of review "is appropriate only when the *trust* instrument allows the *trustee* to interpret the instrument and when the *trustee* has in fact interpreted the instrument").

These decisions leaned heavily upon the fact that "the *Firestone* rule was predicated on basic trust law principles." *Gritzer*, 275 F.3d at 296.

The precedent established by the courts below in this case dangerously undercuts the balance that this Court struck in *Firestone*. That balance, which is one of the foundations of the common law of trusts, simultaneously acknowledges a fiduciary's high duty of care to its beneficiary and allows the fiduciary to function within its area of discretion without fear of liability for exercising its good faith judgment on the beneficiary's behalf. But where the decision maker is not a fiduciary and, therefore, owes no particular duty of care to the beneficiary, the entire reason for judicial deference to a non-fiduciary's decisions no longer exists. Because the precedent established by the courts below serves to undermine the purpose of ERISA — to safeguard and promote the interests of participants in employee welfare and benefit plans and their beneficiaries, *Shaw*, 463 U.S. at 90 —, this Court should review and reverse those decisions.

CONCLUSION

THEREFORE, for the reasons stated above, Petitioner Lois Marx requests of this Court that it GRANT her Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

Date: July 24, 2002 Ronald H. Surkin

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 01-2918

LOIS E. MARX, Appellant
v.

MERIDIAN BANCORP, INC., LONG TERM DISABILITY PLAN; JOHN DOES 1-10 IN THEIR CAPACITIES AS MEMBERS OF THE ADMINISTRATIVE COMMITTEE ON EMPLOYEE BENEFIT PLANS (A.K.A. THE BENEFITS DESIGN COMMITTEE); METROPOLITAN LIFE INSURANCE COMPANY; CORESTATES FINANCIAL CORPORATION

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 99-CV-4484)
District Judge: The Honorable Ronald L. Buckwalter

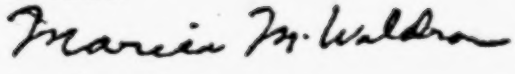
Argued, February 26th, 2002

Before: ROTH, FUENTES and GIBSON*, Circuit Judges

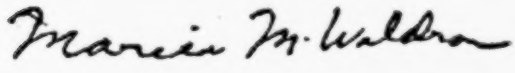
JUDGMENT

This cause came to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued on February 26th, 2002. On consideration whereof, it is now here ORDERED AND ADJUDGED by this Court that the judgment of the said District Court entered June 20, 2001, be, and the same is hereby AFFIRMED. All of the above in accordance with the opinion of this Court. Costs to be taxed against the Appellant.

ATTEST:



Dated: March 27, 2002
Certified as a true copy and issued in lieu of a formal mandate on May 8, 2002.
Teste:



Clerk, United States Court of Appeals for the Third Circuit

* The Honorable John R. Gibson, United States Circuit Judge for the Eight Circuit, sitting by designation.

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 01-2918

LOIS E. MARX, Appellant

v.

MERIDIAN BANCORP, INC., LONG TERM DISABILITY PLAN; JOHN DOES 1-10 IN THEIR CAPACITIES AS MEMBERS OF THE ADMINISTRATIVE COMMITTEE ON EMPLOYEE BENEFIT PLANS (A.K.A. THE BENEFITS DESIGN COMMITTEE); METROPOLITAN LIFE INSURANCE COMPANY; CORESTATES FINANCIAL CORPORATION

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 99-CV-4484)
District Judge: The Honorable Ronald L. Buckwalter

Argued, Tuesday, February 26, 2002

Before: ROTH, FUENTES and GIBSON*, Circuit Judges

(Opinion Filed: March 27, 2002)

* The Honorable John R. Gibson, United States Circuit Judge for the Eight Circuit, sitting by designation.

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OPINION OF THE COURT

FUENTES, Circuit Judge:

Lois Marx appeals the District Court's decision to grant the Defendants' summary judgement motion, in opposition to Marx's suit for long-term disability benefits under the Employee Retirement Income Security Act of 1974 ("ERISA"). For the reasons stated below, we will affirm.

Lois Marx began working as a secretary for Meridian Bancorp, Inc. ("Meridian") in 1991. In January 1995, Marx requested a leave of absence on account of back pain which she claimed affected her ability to sit or stand for extensive periods of time. With the support of her treating physician, Dr. Mark Kender, Marx filed a claim for long-term disability ("LTD") benefits with Defendants under the Meridian Bancorp, Inc. Long-Term Disability Plan (the "Plan"), alleging an inability to work on account of the pain and the depression it caused her.

The LTD Plan is an ERISA-regulated employee welfare benefit plan established by Meridian. Under the Plan, the Administrative Services Committee of Meridian has been designated as the "Plan Administrator," and is responsible for the day-to-day operation and management of the Plan. See, Meridian Bancorp Long Term Disability Plan, Art. I, § 1.24.

Significantly, Meridian had entered into an Administrative Services Agreement (the "Agreement") with Metropolitan Life Insurance Co. ("MetLife") to carry out many of its responsibilities under the Plan. Generally, as the "Claim Administrator," MetLife was required to provide "claim adjudication services at the direction of the Plan Administrator." Id. at § 1.06.

To establish a claim for LTD under the Plan, a claimant must show that she is unable to perform the duties of her own job. See, the Plan § 1.32 (defining a Participant's "total disability" as being "unable to engage in the material and substantial duties of his or her Regular Occupation immediately prior to the Date of Disability."). If a claimant can establish disability under this standard, she may receive benefits during a two year "Waiting Period." After the Waiting Period, a claimant's eligibility is assessed under a more stringent standard, one which requires her to demonstrate that she is unable "to perform *any* occupation" for which she "is qualified or may reasonably become qualified by training, education or experience." §§ 1.32 & 1.03 of the Plan (defining "Total Disability" and "Any Occupation," respectively).[1]

Marx succeeded in her claim to receive LTD benefits under the initial standard and received benefits for the two year Waiting Period. During that time, Marx consulted other doctors, underwent surgery for her back and took steps to establish a claim for permanent disability benefits. For instance, she submitted medical records to the Plan Administrator, received an independent medical examination and filed for Social Security Disability Income ("SSDI"), all in accordance with the Plan's requirements.

At the end of the Waiting Period, Defendants reevaluated Marx's eligibility under the more stringent

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[1] Such two-tiered definitions are common in disability plans. See, e.g., Couzens v. The Equitable Life Assurance Society of U.S., 1998 WL 695425 at *1 (E.D.Pa., 1998).

standard of review and denied Marx's benefits. Marx appealed this determination and argued that SSA's 1996 finding of total disability should have resulted automatically in the same decision by Defendants. Marx also criticized the behavior of Dr. O'Brien, the independent medical examiner and hence questioned the credibility of his findings.[2] Despite these arguments, Defendants upheld their decision on appeal.

On July 16, 1998, Marx, now represented by counsel, sought a third review of her claim. Marx again argued that the SSA's findings should have been conclusive. The Claim Administrators, Metropolitan Life Insurance Company ("MetLife"), informed Marx that she could submit additional medical evidence and Marx followed this suggestion. However, on September 23, 1998, MetLife informed Marx that it would not re-open her case.

On September 8, 1999, Marx filed a claim with the U.S. District Court for the Eastern District of Pennsylvania under ERISA. See, 29 USC 1132(a)(1)(B)(authorizing, *inter alia*, suits by a participant or beneficiary in an approved plan "to recover benefits due to him under the terms of his plan"). After the completion of discovery, Defendants filed for summary judgment.

On June 20, 2001, the District Court granted the Defendant's summary judgment motion. See, Marx v. Meridian, 2001 WL 706280. The Court first determined that the appropriate standard for reviewing MetLife's denial of Marx' LTD benefits was a deferential 'arbitrary and capricious' standard. Id. at *2.

The Court next applied the Arbitrary and Capricious standard to Marx' substantive claims. Regarding Marx' claim that MetLife had denied her LTD benefits on the

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[2] Importantly, the Plan provides that "[i]n all cases, the decision of the independent physician may be final relative to the adjudication of the claim." Joint Appendix at 446, the Plan §6.04(g).

basis of an incomplete medical file, the District Court found that "temporal discrepancies" between the letters actually submitted by MetLife and Marx' claims in her affidavit about which letters were missing "[led] the Court to question the integrity of Plaintiffs affidavit." The Court therefore found that "in the absence of any evidence other than Plaintiff's assertions that she submitted these materials, the Court does not find that this issue is sufficient to preclude a grant of summary judgment in favor of Defendants." *Marx*, 2001 WL, at *4.

The Court next addressed Marx' claim that the decision of the Social Security Administration to grant Marx SSDI benefits mandated a parallel finding by MetLife with regard to Marx' LTD benefits. The Court determined that, according to the Plan, an SSA finding is only one factor among many that may be considered when granting disability benefits and would not mandate receipt of LTD benefits. Id. at *5.

Finally, the Court considered Marx' claim that the decision of the independent medical examiner, Dr. O'Brien, that Marx was not totally disabled, was unfounded. The Court first observed that Marx' claim only referenced the standard medical check-box questionnaire filled out by the doctor, but ignored the four-page, single-spaced analysis Marx' condition submitted by Dr. O'Brien. The Court also noted Dr. O'Brien's comment that, during the examination, Marx was "uncooperative and recalcitrant." The Court concluded that "in light of [Marx'] behavior, the fact that Dr. O'Brien's conclusions are supported by other evidence in the record and the fact that the Court places more significance on Dr. O'Brien's discussion than on the checkmarks on a form, the Court finds that MetLife's reliance on Dr. O'Brien's analysis does not render MetLife's decision arbitrary and capricious." *Id.* The Court accordingly granted summary judgement and dismissed Marx' claim.

On July 18, 2001, Marx timely filed for appellate review with this court.

Our review of a District Court's decision to grant summary judgement is plenary. Orvosh v. Program of Group

Ins. for Salaried Employees of Volkswagen of America, Inc., 222 F.3d 123, 128-29 (3d Cir. 2000). Therefore, like the District Court, this Court must consider the evidence in the record in the light most favorable to the nonmoving party, See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, (1986). Additionally, we may grant summary judgment only where the moving party has established that there are no genuine issues of material fact and that the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56. However, we may affirm the summary judgment of the District Court if it could have been reached on any ground below, including grounds rejected or not reached by the District Court. Maryland v. Peat Marwick Main & Co., 923 F.2d 265 (3d Cir. 1991).

After a careful review of the briefs and appendices submitted by the parties, we find no-basis for disturbing the District Court's rulings on Marx' substantive claims. We write only to address Marx initial claim on appeal: that the District Court erred in making its threshold determination, when it decided to use a deferential arbitrary and capricious standard, rather than reviewing MetLife's denial of Marx's application for LTD benefits *de novo*.[3] We exercise plenary review of the standard applied by the District Court. See Gritzer v. CBS Inc., 275 F.3d 291, 295 (3d Cir. 2002).

ERISA explicitly authorizes suits by a participant or beneficiary "to recover benefits due to [her] under the terms of his plan, to enforce [her] rights under the terms of the plan, or to clarify [her] rights under the terms of the plan." See 29 U.S.C. 1132(a)(1)(B). However, ERISA does not set out the standard of review for an action brought by a plan participant under §1132(a)(1)(B). See, Mitchell v. Eastman Kodak Co., 113 F.3d 433 (3d Cir. 1997). Nevertheless, the Supreme Court has addressed the question of the appropriate standard for

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[3] At oral argument, Marx' attorney limited his remarks to this questions, claiming that this issue was dispositive.

actions challenging "denials of benefits based on plan interpretations." See, Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989). In Firestone, the Court held that "a denial of benefits challenged under §1132(a)(1)(B) is to be reviewed under a *de novo* standard *unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.*" Id. at 115 [emphasis added]. This Court subsequently held that where *de novo* review is inappropriate, an arbitrary and capricious standard should be applied in evaluating a claim against a plan administrator for denial of benefits. See, Stoetzner v. U.S. Steel Corp., 897 F2d 115, 119 (3d Cir. 1990); See also, Firestone, 489 US at 114 ("[w]here the plan affords the administrator discretionary authority, the administrator's interpretation of the plan *will not be disturbed if reasonable.*") [emphasis added]. Therefore, we must determine whether the Plan granted discretionary authority to MetLife to determine Marx' eligibility for LTD benefits.

To determine the proper standard of review, we must begin with the language o the plan. See, Luby v. Teamsters Health, Welfare & Pension Trust Funds, 944 F.2d 1176, 1180 (3d Cir. 1991)(instructing that "[w]hether a plan administrator's exercise of power is mandatory or discretionary depends upon the terms of the plan," and that "the terms of the plan are construed without deferring to either party's interpretation."); See also, Firestone, 489 US at 115 ("the validity of a claim is likely to turn on the interpretation of terms in the plan at issue"). The District Court below examined the language of Meridian's LTD Plan and found that the Plan "does not contain an [explicit] grant of authority to MetLife." Marx v. Meridian, 2001 WL 706280, at *3. Nevertheless, under ERISA, the discretion required to trigger the deferential arbitrary and capricious standard of review need not be expressly stated in the plan, but can be implied from its terms. See, Luby, 944 F.2d at 1180, quoting, Nobel v. Vitro Corp., 1180, 1187 (4th Cir. 1989)(no "magic words," such as "discretion is granted ...," need be expressly stated in order for

the plan to accord the administrator discretion to interpret plan terms and to hear and decide disputes between persons alleging themselves to be beneficiaries, so long as the plan on its face clearly grants such discretion). Accordingly, the District Court found that certain provisions of the Plan, "taken together with the structure of MetLife's responsibilities,...suggest an almost unavoidable grant of [implicit] discretionary authority by Meridian to MetLife," and therefore reviewed MetLife's conclusions under an arbitrary and capricious standard. *Id.* At oral argument, counsel for Meridian relied of one specific provision in asserting that the terms of the Plan make it clear on its face that Meridian had granted discretion to MetLife to determine eligibility for the Plan's participants. See, the Plan, §6.04(j)("Upon request for review [of a denial of benefits] Plan Administrator will arrange and supervise a full review of the claim by the Claims Administrator [MetLife], *whose decision after such a review shall be final.*") [emphasis added].

At oral argument, counsel for Marx admitted that the provisions of the Plan (and specifically §6.04(j)) grant some discretion to MetLife to determinate a Participant's eligibility for LTD benefits. However, he argued that MetLife's decision denying Marx' LTD benefits must be reviewed *de novo* because MetLife had not been specifically designated an "ERISA fiduciary" under the Plan, and only an "ERISA fiduciary" is entitled to the deferential standard of review. See, the Agreement, Article I (stating that "in the discharge of its obligations under this Agreement, MetLife acts solely as an agent of Meridian...and not as a fiduciary as that term is defined under [ERISA])." In addition, he cited a single piece of correspondence between Meridian and MetLife regarding a previous claimant's application for LTD benefits as demonstrating an "undeniable course of dealing" between the two companies that clearly indicates that Meridian, not MetLife, had ultimate authority over decisions to deny Plan benefits. See, II Appendix 409, Letter from MetLife to Meridian ("We have completed a review of Ms. Williams LTD claim [and MetLife therefore] recommend[s] termination of

benefits. As claims fiduciary, you [Meridian] must inform the claimant of your final decision in this matter."])

However, there is no requirement in the jurisprudence of either the Supreme Court or this Court that limits the deferential standard of review to ERISA fiduciaries. As the District Court below pointed out, Firestone explicitly instructed that a Benefit Plan may confer discretionary authority sufficient to trigger the deferential standard of review on either a fiduciary *or* an administrator. See, Marx, 2001 WL, at *3, note 2, citing, Firestone, 489 U.S. at 115. Furthermore, the Third Circuit case law cited by Marx is inapposite. See, e.g. Gritzer v. CBS. Inc., 275 F.3d 291, 295 (3d Cir. 2002) (holding that an Administrator's denial of benefits under a pension plan that was governed by ERISA was subject to *de novo* review, *where the administrator did not in fact exercise discretion when making denial of benefits*). Neither party contends here that MetLife did not in fact exercise discretion in denying Marx' benefits in this instance. Additionally, the language of ERISA itself specifically allows a "named [ERISA] fiduciary" to delegate its fiduciary responsibilities *to non-fiduciaries*. See 29 U.S.C. 1105(c)(1)(instructing that "[t]he instruments under which a plan is maintained may expressly provide for procedures ...for named fiduciaries to designate persons *other than named fiduciaries* to carry out fiduciary responsibilities ... under the plan.").

Furthermore, Marx' allegation that the prior correspondence between Meridian and MetLife demonstrates an "undeniable course of dealing" between the parties is far from concrete. The subsequent letter, from Meridian to the claimant, Ms. Williams, informs her that "based on *Metropolitan Life's* review of your file...[*MetLife*] ha[s] no alternative but to uphold their previous decision to terminate your LTD claim." See, II Appendix 411 [emphasis added]. Clearly, even in this one instance that Marx offers, one could reasonably assume that Meridian had delegated final decision making authority to MetLife, with regard to the claimant's right to LTD benefits. This court has previously instructed that

"[a]lthough extrinsic evidence can be used to show that a contract is ambiguous ... extrinsic evidence cannot be used to create an ambiguity." U.A.W. v. Skinner Engine Co., 188 F.3d 130 (3d Cir. 1999). (noting also that a party offering such extrinsic evidence "must produce objective facts, not subjective and self-serving testimony, to show that a contract which looks clear on its face is actually ambiguous.").

We find that the language of the Plan, and specifically §6.040), is clear on its face in granting discretionary authority to MetLife to determine eligibility for LTD benefits under the Meridian Plan. Since the language is clear on its face, we reject the extrinsic "course of dealing" evidence offered by Marx. See Epright v. Environmental Res. Mgt., Inc. Health & Welfare Plan, 81 F.3d 335, C.A.3 (Pa.), 1996 ("[P]ast practice is of no significance where the plan document is clear."). We therefore affirm the District Court's finding that a deferential arbitrary and capricious standard of review was proper in this instance.

Accordingly, we will affirm the Order of the District Court, granting Defendant's motion for summary judgment, and dismiss Marx' claim in full.

TO THE CLERK OF THE COURT:
Kindly file the foregoing Opinion.

/s/ Julio M. Fuentes
Circuit Judge

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 01-2918

LOIS E. MARX, Appellant

v.

MERIDIAN BANCORP, INC., LONG TERM DISABILITY PLAN; JOHN DOES 1-10 IN THEIR CAPACITIES AS MEMBERS OF THE ADMINISTRATIVE COMMITTEE ON EMPLOYEE BENEFIT PLANS (A.K.A. THE BENEFITS DESIGN COMMITTEE); METROPOLITAN LIFE INSURANCE COMPANY; CORESTATES FINANCIAL CORPORATION

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 99-CV-4484)
District Judge: The Honorable Ronald L. Buckwalter

SUR PETITION FOR REHEARING

Present: BECKER, Chief Judge, SLOVITER, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES and GIBSON[1], Circuit Judges

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[1] The Honorable John R. Gibson, United States Circuit Judge for the Eighth Circuit, sitting by designation, is limited to panel rehearing only.

The petition for Rehearing filed by the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, the Petition for Rehearing by the panel and the Court en banc, is hereby DENIED. Chief Judge Becker would have granted rehearing.

BY THE COURT,

/s/ Julio M Fuentes
United States Circuit Judge

DATED: April 30, 2002
lwc/cc: E. Thomas Henefer, Esq.
Ronald H. Surkin, Esq.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LOIS E. MARX, et al. Plaintiffs, v. MERIDIAN BANCORP, INC. LONG TERM DISABILITY PLAN, et al., Defendants.	CIVIL ACTION NO. 99-CV-4484

MEMORANDUM

BUCKWALTER, J. June 20, 2001

Presently before this Court is a Motion for Summary Judgment on behalf of defendants, Meridian Bancorp, Inc. Long Team Disability Plan et al. ("Defendants").

Plaintiff Lois E. Marx ("Plaintiff") brought this suit for long term disability benefits ("LTD") under 29 U.S.C. §§ 1001-1461, the Employee Retirement Income Security Act of 1974 ("ERISA") and alleged improper denial of benefits as well its breach of fiduciary duty. For the reasons set forth below, Defendants' Motion for Summary Judgment will be granted in its entirety.

I. BACKGROUND

Beginning in 1991, Plaintiff worked as a secretary for Meridian Bancorp, Inc. ("Meridian"). Then, in January 1995, Plaintiff requested a leave of absence on account of back pain which she claimed affected her ability to sit or stand for

extensive periods of time. With the support of her treating physician., Plaintiff filed a claim for LTD with Defendants under the Meridian Bancorp, Inc. Long Term Disability Plan[1] (the "Plan") alleging an inability to work on account of this pain and the depression it caused her.

To establish a claim for LTD under the Plan, a claimant must show that she is unable to perform the duties of her job. If a claimant can establish disability under this standard, she may receive benefits during a two year "Waiting Period." After the two years, a claimant's eligibility is assessed under more stringent standard, one which requires Plaintiff to demonstrate that she is unable "to perform *any* occupation for which she is qualified or may reasonably become qualified by training, education or experience." § 1.31 of the Plan, (emphasis added)

Plaintiff succeeded in her claim to receive LTD under the initial standard and received benefits for the two year Waiting Period. During that time, Plaintiff consulted other doctors, underwent surgery for her back and took steps to establish a claim for permanent disability benefits. For instance, she submitted medical records to the Plan Administrator, received an independent medical examination conducted by Dr. O'Brien and filed for Social Security Disability Income ("SSDI"), all in accordance with the Plan's requirements.

At the end of the Waiting Period, Defendants reevaluated Plaintiff's eligibility under the more stringent standard of review and denied Plaintiff's benefits. Plaintiff appealed this determination and argued that SSA's 1996 finding of total disability should have resulted automatically in the same decision by Defendants. Plaintiff also criticized the behavior of the independent medical examiner and hence

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[1] The Plan is self-funded and it contracts with MetLife to handle adjudication of claims.

questioned the credibility of his findings. Despite these argurnents, Defendants upheld their decision on appeal.

In 1998, Plaintiff, represented by counsel, sought a third review of her claim. Plaintiff again argued that the SSA's findings should have been conclusive. The Claim Administrators, Metropolitan Life Insurance Company ("MetLife"), informed Plaintiff that she could submit additional medical evidence and Plaintiff followed this suggestion. However, MetLIfe ultimately informed Plaintiff that it would not re-open her case. Plaintiff subsequently filed this claim with this Court.

II. LEGAL STANDARD

A motion for summary judgment shall be granted where all or the evidence demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A genuine issue of material fact exists when "a reasonable jury could return a verdict for the nonmoving party" Anderson v. Liberty Lobby Inc., 477 U.S. 242, 248 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Id.

If the moving party establishes the absence of the genuine issue of material fact, the burden shifts to the nonmoving party to "do more than simply show that there is some metaphysical, doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

When considering a motion for summary judgment, a court must view all inferences in a light most favorable to the nonmoving party. See United States v. Diebold, 369 U.S. 654, 655 (1962). The nonmoving party, however, cannot "rely merely upon bare assertions, conclusory allegations or suspicions" to support its claim. Fireman's Ins. Co. v. DeFresne, 676 F.2d 965, 969 (3d Cir. 1962). To the contrary, a mere

scintilla of evidence in support of the non-moving party's position will not suffice; there must be evidence on which a jury could reasonably find for the nonmovant. Liberty Lobby, 477 U.S. at 252. Therefore, it is plain that "Rule 56(c)" mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Cclotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In such a situation, "[t]he moving party is 'entitled to a judgment as a matter of law' because the non-moving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." Id. at 323 (quoting Fed. R.. Civ. P. 56(c)).

III. DISCUSSION

A. Appropriate Standard for Analyzing Plaintiffs Claim

In reviewing a claim for denial of disability benefits under ERISA, the Supreme Court held in Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989) that:

> a denial of benefits challenged under § 1132(a)(1)(13) [which governs the validity of a claim for benefits under an ERISA plan] is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.

The Third Circuit subsequently held that where de novo review is inappropriate, an arbitrary and capricious standard should be applied in evaluating a claim against a plan administrator for denial of benefits. See, e.g., Stoetzner v. United States Steel Corp., 897 F.2d 115, 119 (3d Cir. 1990).

Therefore, a threshold question for the Court is which standard to apply.

To determine the standard of review, the Court begins with the language of the plan and evaluates whether the benefit plan gives the administrator or the fiduciary discretionary authority to determine eligibility or interpret the terms of the plan. See Firestone, 489 U.S. at 115; see also Stoetzner, 897 F.2d at 119. This grant of discretion can be express or implied. See Luby v. Teamsters Health Welfare and Pen. Trust Funds, 944 F.2d 1176, 1180 (3d Cir. 1991). If there is no direct language to indicate a grant of discretion, language suggesting that the Plan administrator[2] will make the final decision as to eligibility may be enough for the Court to find the Plan administrator has authority. See, e.g., Mitchell v. Eastman Kodak Co., 113 F.3d 433, 438-9 (3d Cir. 1997)(describing language and provisions where arbitrary and capricious standard is appropriate).

The Plan before this court does not contain a direct grant of authority to MetLife. However, the Plan does include the type of language which other courts in this circuit have held to grant discretion to the Plan Administrator and the Claims Administrator. See, e.g., id. at 438 n.5 Here, the necessary language for this grant of discretion is sprinkled throughout the Plan. Specific examples can be found in Article 6.04 under "Claim Procedure" which establishes the Plan Administrator as the entity that processes the claims. The same article subsection (g) provides that the Plan Administrator may

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[2] In the development of this approach, the courts have borrowed from principles of trust law. See Moench v. Robertson, 62 F.3d 553, 566 (3d Cir. 1995). The integration of these concepts into ERISA law, however, does not limit the analysis only to cases where entities are labeled as fiduciaries. In fact, the Supreme Court stated that *de novo* review is proper except where an administrator *or* a fiduciary receives a grant of discretion. See Firestone, 489 U.S. at 115.

request an independent medical examination of the claimant. Additionally, Article 6.04(j) delegates the review of a denial of benefits to the Claims Administrator, whose decision as to eligibility is final. These provisions taken in conjunction with § 6.09, the "Administration" section of the Plan, and the of tasks set forth in Article I, indicate a grant of discretion to the Plan and Claims Administrators, making the arbitrary and capricious standard appropriate.

Plaintiff takes issue with this understanding of the Plan's language and alleges that MetLife did not receive a grant of discretionary authority and therefore a *de novo* standard is required. Plaintiff contends that although Meridian abdicated its own authority to MetLife, this transfer does not confer the discretionary authority on MetLife. Plaintiff supports its argument by citing a Article I of the Administrative Services Agreement ("Agreement") between the contractholder [Plaintiff], the Plan Administrator [Administrative Committee for Employee Benefits of Meridian Bancorp, Inc.] and Metropolitan Life Insurance Company which states that "Metropolitan acts solely as an agent of Meridian Bancorp Inc. and/or The Administrative Committee and not as a fiduciary as that term is defined under the Employee Retirement Income Security Act of 1974." See Def. Exh. 47. Plaintiff again argues that these statements mean MetLife has no authority to determine eligibility and therefore its decision should be disregarded.

However, as indicated *supra*, Meridian hired MetLife, as provided for in Article I of the Plan, and delegated to it certain responsibilities including the job of Claims Administrator. This arrangement is illustrated by the introductory paragraph to the Agreement stating, "Administrative Committee has delegated authority to act on behalf of the plan administrator." Moreover, Section C.4. of the Agreement explains that MetLife will "[e]valuate claims submitted, consistent with the terms and provisions of the Plan and with the interpretative rules and regulations issued by the appropriate Plan Fiduciary." This provision also allows for

MetLife to decide whether a review of an applicant's claims shall require additional investigation into the claims. Taken together with the structure of MetLife's responsibilities, these provisions reveal that MetLife is the adjudicator of disability claims for the Plan and suggest an almost unavoidable grant of discretionary authority by Meridian to MetLife. Therefore, an arbitrary and capricious standard of review of Plaintiff's claim for benefits is appropriate.

Having determined that MetLife is an administrator of disability benefits, the Court can discount another of Plaintiff s arguments for de novo review. Plaintiff asserts that as MetLife is not a fiduciary under ERISA,[3] de novo review cannot be applied. However, as explained *supra*, this argument relies too heavily on the role of fiduciary law in this analysis. Although some fiduciary law has been used in the ERISA analysis, the word fiduciary does not appear in this portion of the statute. See 29 U.S.C. § I I32(a)(1)(B). Moreover, the Supreme Court in Firestone stated that the de novo review is applicable except where discretion was granted to either an administrator *or* a fiduciary. So, rather than focusing on the technical designation of MetLife as a non-fiduciary, the Court examines the actual implementation of the benefits plan and the language that guides this operation. Under this analysis, the Court deems that MetLife is an administrator as described by the Supreme Court in Firestone, and as such, it has received a grant of discretionary authority. Hence, the Court applies the arbitrary and capricious standard to Meridian's denial of Plaintiffs benefits.

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[3] Plaintiff identifies the introductory statement in the Agreement which states MetLife is not a fiduciary under ERISA. See Agreement *supra*.

B. Application of Arbitrary and Cstpricious Standard to Count I

Where the arbitrary and capricious standard is applied, the Court is given a limited scope of review and "the district court may overturn a decision of the Plan administrator only if it is 'without reason, unsupported by the evidence or erroneous as a matter of law.'" Abnathya v. Hoffman LaRoche, Inc., 2 F.3d 40, 45 (3d Cir. 1993) (quoting Adamo v. Anchor Rocking Corp., 720 F.Supp. 491, 500 (W.D. Pa. 1989)). The Court understands Plaintiff to asserts three grounds for denying summary judgment even under this narrow standard. First, Plaintiff claims that the file reviewed by MetLife was incomplete. Second, Plaintiff alleges that Defendants gave no weight to the SSA's decision that Plaintiff was disabled. Third, Plaintiff asserts that Defendants' decision rested too heavily on the observations of Dr. O'Brien, the independent medical examiner, and that Dr. O'Brien did not reach any medical conclusions but instead attacked Plaintiff in an "ad hominem" manner.

As to the first issue, Plaintiff alleges that the materials reviewed by MetLife in evaluating her claim were incomplete. Plaintiff professes in an affidavit that she had provided MetLife with documents that were not contained in MetLife's file. However, Defendants submit an affidavit from a MetLife employee confirming that the documents contained in the file Plaintiff received from MetLife were the complete contents of Plaintiffs file. Plaintiff states in her affidavit that she mailed the missing documents to Defendants in June 1997 and again in February 1998. However, several letters included among those documents were dated May and June of 1998. This temporal discrepancy leads the Court to question the integrity of Plaintiffs affidavit and in the absence of any evidence other than Plaintiff's assertions that she submitted these materials, the Court does not find that this issue is sufficient to preclude a grant of summary judgment in favor of Defendants.

The second reason Plaintiff produces for denial of summary judgment is that Defendant did not rely heavily on the decision of the SSA in making its own determination as to Plaintiff's disability. To support this contention, Plaintiff highlights the provisions of the plan that require a claimant to apply for Social Security Disability Income ("SSDI") in order to retain LTD. Plaintiff also mentions the absence of any reference to the Social Security Administration's evaluation when Defendants rendered their decision.

While Plaintiff is correct that a finding of disability by the SSA is a prerequisite to obtaining disability under the Plan, the language of the Plan does not require that a finding of disability by the SSA mandates a parallel determination under the Plan. Instead, a SSA finding is one factor among many that may be considered when granting disability benefits. Although Defendants here did not present their reasons for disagreeing with the SSA's decision, they similarly did not discuss in detail their analysis of other documents or types of evidence, therefore, their decision not to mention the SSA's findings does not mean that the evidence was not considered. Furthermore, as Defendants' decision is reasonably supported by the record, the Court believes that Defendants' treatment of the SSA's findings does not render their decision invalid.

Finally, as to the adequacy of Dr. O'Brien's evaluation, Plaintiff contends that Dr. O'Brien's conclusions were unfounded because he checked boxes on a standard questionnaire that indicated he was unable to make some determinations regarding Plaintiff's abilities. However, in focusing on these checkmarks, Plaintiff ignores the detailed narrative that Dr. O'Brien provided in which he placed his overall observations of Plaintiff into a context. Included in this four-page, single-spaced analysis, Dr. O'Brien mentions that Plaintiff was uncooperative and recalcitrant and he explains his observations. In light of Plaintiff's behavior, the fact that Dr. O'Brien's conclusions are supported by other evidence in the record and the fact that the Court places more significance on Dr. O'Brien's discussion than on the checkmarks on a form, the

Court finds that MetLife's reliance on Dr. O'Brien's analysis does not render MetLife's decision arbitrary and capricious.

C. Breach of Fiduciary Duty

Plaintiff alleges breach of fiduciary duty under ERISA § 502(a), 29 U.S.C. § 1132(a) and claims that Defendant's failure to follow certain procedures resulted in the denial of her disability benefits. Specifically, Plaintiff contends that she was arbitrarily denied an adequate review of her claim and therefore should be entitled to an additional appeal. However, Plaintiff fails to provide any evidence that in the absence of these alleged procedural deficiencies, MetLife would have decided her claim for benefits differently. For instance, Plaintiff contends that her appeal of the Plan's denial of LTD violated the plan procedures because the Plan Administrator allegedly did not supervise MetLife's review of her claim. The Court finds this grievance to be unsupported. The Plan is self-funded so MetLife has no self-interest in denying Plaintiff benefits. Additionally, Plaintiff fails to provide evidence that the alleged failure to comply with Plan procedures caused her denial of benefits. Without demonstrating causation, Plaintiff s claim for breach of fiduciary duty must fail. See Mose v. United States Health Care Sys., No. 95-6553, 1996 U.S. Dist. LEXIS 9913, at *5 (stating that denial of benefits alone is not grounds for a breach of fiduciary duty). Accordingly, Plaintiff's claim does not survive the motion for summary judgment.

IV. CONCLUSION

For the foregoing reasons, Defendants' Motion for Summary Judgment is GRANTED in its entirety as to all claims and all defendants. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LOIS E. MARX, et al. Plaintiffs, v. MERIDIAN BANCORP, INC. LONG TERM DISABILITY PLAN, et al., Defendants.	CIVIL ACTION NO. 99-CV-4484

ORDER

AND NOW, this 20th day of June, 2001, upon consideration of Defendants' Motion for Summary Judgment (Docket No. 17), Plaintiffs response thereto (Docket No. 19), Defendants' reply (Docket No. 21) and Plaintiffs sur-reply (Docket No. 24), it is hereby ORDERED that Defendant's motion is GRANTED in its entirety and Plaintiff's complaint is dismissed.

This case is CLOSED.

BY THE COURT:

RONALD L. BUCKWALTER, J.

Supreme Court, U.S.
FILED
SEP 4 2002
CLERK

No. 02-152

IN THE

Supreme Court of the United States

LOIS E. MARX,

Petitioner,

v.

MERIDIAN BANCORP, INC. LONG TERM DISABILITY PLAN; JOHN DOES 1-10, IN THEIR CAPACITIES AS MEMBERS OF THE ADMINISTRATIVE COMMITTEE ON EMPLOYEE BENEFIT PLANS (AKA THE BENEFITS DESIGN COMMITTEE); METROPOLITAN LIFE INSURANCE COMPANY; CORESTATES FINANCIAL CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. **Whether the Court should deny certiorari where the Court of Appeals' decision involves the application of well-settled principles of contract interpretation and ERISA?**

2. **Whether the Court should deny certiorari to consider an issue already resolved in Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989)?**

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE

The Petitioner is Lois E. Marks, the plaintiff before the District Court and appellant before the Circuit Court. Respondents are Meridian Bancorp, Inc. Long-Term Disability Plan; John Doe's 1 through 10, in their capacities as members of the Administrative Committee on Employee Benefit Plans (a/k/a the Benefits Design Committee); Metropolitan Life Insurance Company; CoreStates Financial Corporation, the defendants before the District Court and appellees before the Circuit Court.

The parent company of CoreStates Financial Corporation, by virtue of mergers, is Wachovia Corporation, and there are no other publicly held companies owning ten percent or more of the corporation's stock.

Meridian Bancorp, Inc. Long Term Disability Plan is an employee benefit plan sponsored by Wachovia Corporation, as a successor by merger.

The parent company of Metropolitan Life Insurance Company is MetLife, Inc., and there are no other publicly held companies owning ten percent or more of the corporation's stock.

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I. COUNTERSTATEMENT OF THE CASE

A. Introduction

This case involves a 1997 decision by Metropolitan Life Insurance Company (MetLife") to deny long-term disability benefits to Lois E. Marx ("Marx") under the Meridian Bancorp, Inc. Long Term Disability Plan (the "Plan"), a welfare benefit plan regulated by the Employment Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001-1461 ("ERISA"). The Plan was established by Marx's former employer, Meridian Bank.[1]

While Marx raises a procedural issue concerning the standard of review, it is notable that neither the District Court nor the Court of Appeals found any grounds to question the substantive conclusion that Marx was not disabled under the Plan. Indeed, the denial of benefits was supported by, among other things, (a) an independent medical examination, (b) two reports from independent physicians who reviewed Marx's medical records, and (c) the analysis of one of MetLife's in-house nurses.

Marx now asks this Court to review MetLife's denial of benefits under the pretext that MetLife was not an ERISA fiduciary and as such, its decision should not have been given any deference by the lower courts. Marx further claims that the allegedly incorrect standard of review applied by the lower courts creates "dangerous" precedent and a split in the Circuit Courts.

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[1] Meridian Bank was a subsidiary of Meridian Bancorp, Inc. which was subsequently merged into CoreStates Financial Corporation. For ease of reference, Meridian and CoreStates will be referred to herein as "Meridian."

Contrary to Marx's arguments, neither the decision to deny benefits nor the subsequent review by the lower courts were in any way inconsistent with applicable law. To the contrary, as explained in detail below, this case involves principles of straightforward contract interpretation that were properly applied by the lower courts.

B. Opinions Below

On September 8, 1999, Marx filed suit in the United States District Court for the Eastern District of Pennsylvania seeking review of the denial of her claim for long-term disability benefits under the Plan.

When reviewing a denial of benefits under an ERISA plan, courts are required to apply a deferential standard of review if the relevant plan documents give an administrator discretionary authority to interpret the plan terms to determine eligibility for benefits. Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989). Here, Firestone was applied in a routine context: a review of a benefit determination by a third-party administrator of a self-funded ERISA plan.

The District Court reviewed the Plan documents and found that the Plan provided the necessary language to convey discretionary authority to MetLife. While the District Court did not find an express grant of discretionary authority, it found that discretion was implied by the Plan's terms and the circumstances surrounding the parties' relationship.

Using the arbitrary and capricious standard, the District Court then reviewed Marx's substantive claims. After reviewing, among other things, Marx's records,

reports from the independent medical examiner, reports from two independent physicians who reviewed Marx's records, and the analysis of one of MetLife's in-house nurses, the District Court held that MetLife's denial of benefits was neither arbitrary nor capricious, and granted summary judgment in favor of defendants and dismissed Marx's claims.

The Court of Appeals affirmed the District Court's decision, finding no basis to disturb its rulings on Marx's substantive claims. Yet the Court of Appeals disagreed with the District Court's conclusion that the Plan did not provide an express grant of discretion. After reviewing the language of the Plan, the Court of Appeals held the Plan was "clear on its face" in granting discretionary authority to MetLife. The Court of Appeals thus agreed with the District Court's application of an arbitrary and capricious standard of review, but did so after finding that the Plan expressly granted discretionary authority to MetLife.

The Court of Appeals also rejected the argument that non-ERISA fiduciaries cannot exercise discretion and trigger the arbitrary and capricious standard of review. The Court of Appeals first noted that nothing limited the deferential standard of review to ERISA fiduciaries. To the contrary, the Court pointed out that case law and ERISA itself supports granting discretionary authority to non-ERISA fiduciaries, and in turn, applying the correspondingly deferential arbitrary and capricious standard of review. The Court of Appeals noted that in Firestone, 489 U.S. at 115, this Court explicitly declared that a benefit plan may confer discretionary authority to either a fiduciary or an administrator. Equally significant, the Court noted that ERISA allows fiduciaries to delegate fiduciary responsibility to non-fiduciaries. 29 U.S.C. § 1105(c)(1).

C. The Present Petition

Marx seeks Certiorari before this Court for two reasons. First, she alleges that the Court of Appeals incorrectly applied the arbitrary and capricious standard of review to a decision made by an entity with no fiduciary responsibility. Second, Marx alleges that the Court of Appeal's holding that the deferential standard is not limited to ERISA fiduciaries conflicts with Firestone and the holdings of other Circuit Courts.

As explained below, Marx's arguments neither have merit nor present any issues warranting review by this court.

II. REASONS FOR DENYING THE WRIT OF CERTIORARI

This case presents no unsettled or controversial legal issues, and the resolution of Marx's claims will have no impact on the public at large. Instead, the case involves basic principles of contract interpretation and the application of well-settled areas of ERISA law. Although Marx mischaracterizes the Court of Appeal's holding and other relevant case law in attempt to fashion a conflict in the law that does not exist, her attempt fails and no reason exists for this Court to grant certiorari.

A. The Decision Below Involves Well-Settled Principles of Contract Interpretation and ERISA

The center of the dispute here is whether the Plan conveyed discretionary authority to MetLife, the third party administrator for the Plan. The answer to that question is necessarily found in the Plan itself, and as such, requires interpretation of the document. Indeed, as noted below, Marx's entire argument hinges on the interpretation of a single provision of the Plan and whether that provision granted discretion to MetLife; therefore, her argument is in reality one of contractual interpretation. In this regard, the lower courts properly interpreted the Plan within the parameters of well-settled law.

At its core, Marx's argument relies on a series of legally incorrect and/or factually inaccurate assumptions. Thus, Marx relies on the following assumptions: (1) that the Plan did not grant discretion to MetLife; (2) that MetLife was a non-fiduciary under the facts of this case; and (3) that a third party administrator cannot exercise discretion under Firestone. None of Marx's assumptions have merit.

1. The Plan Granted Discretionary Authority to MetLife

As the lower courts held, the Plan grants discretion to MetLife to make the final decision on a claim for benefits. Indeed, the Court of Appeals held that Plan Section 6.04(j) unambiguously grants discretionary authority to MetLife.

To support her argument that MetLife lacked discretion, Marx cites only part – and not all - of Plan

Section 6.04(j) to support her argument. In fact, Marx ignores the most important and relevant clause of the sentence. [Petition, p. 10]. The relevant text of Section 6.04(j) provides:

> Upon request for review Plan Administrator will arrange and supervise a full review of the claims by the Claims Administrator, ***whose decision after such a review shall be final***. (emphasis supplied).

Thus, while Marx claims that the language about the Plan Administrator "arranging and supervising" a review means that MetLife lacked discretion, she ignores the fact that the Plan unambiguously calls on MetLife to render the "final" decision. Her argument is, in essence, one of contract interpretation and does not implicate an important policy question for this Court to review.

Just as significantly, Marx's contract interpretation argument is wrong. When, as here, a plan grants the claims administrator discretionary authority to determine eligibility for benefits, courts are required to apply a deferential standard of review. Firestone, 489 U.S. at 115. In Firestone, this Court confronted the issue of judicial review where an employer (also the plan administrator) denied an employee's benefits under an ERISA plan. Ultimately, the Firestone Court found that where there was no evidence that the administrator had the "power to construe uncertain terms or that determinations are to be given deference" so a de novo standard of review applied. Id. at 115.

In its analysis, the Firestone court interjected the principles of contract law by requiring that the discretionary powers be conferred through the terms of the plan document interpreted with regard to the intention of the settlor (i.e., the employer or plan sponsor):

> The terms of trusts created by written instruments are "determined by the provisions of the instrument as interpreted in light of all the circumstances and such other evidence of the intention of the settlor with respect to the trust is not inadmissible."

489 U.S. at 112 (emphasis added). Here, the plan sponsor's intention is clear: to have MetLife exercise the discretion to render "final" decisions. This is not surprising when context is considered. The plan sponsor was a bank with no particular expertise in disability and it therefore quite logically delegated final decision making authority to MetLife, an expert in disability claims.

Thus here, as with the review of the language of any other contract, the Court of Appeals reviewed the Plan language to determine whether the Plan granted MetLife discretionary authority. And, after a review of the Plan language, the Court of Appeals found that the Plan, in fact, unambiguously granted MetLife discretionary authority. The Court's interpretation of the Plan was correct and presents no issue warranting review by this Court.

2. MetLife was Acting as a Fiduciary

Marx assumes that MetLife was not acting in a fiduciary capacity and therefore frames the issue as whether an arbitrary and capricious standard of review can be applied to the decision of a non-fiduciary. But both the applicable regulations and case law confirm that MetLife was acting as a fiduciary in exercising the discretionary authority provided to it in the Plan. In short, Marx's petition asks the wrong question.

The Department of Labor's regulations provide that an individual who exercises authority on behalf of an ERISA fiduciary in interpreting and administering a plan will be deemed a fiduciary. 29 CFR § 2509.75-8, Question D-3. Such individuals may include a "benefit supervisor" who has the final authority to deny benefits. Id. Thus, when discretion is bestowed to a third party administrator on behalf of an ERISA fiduciary, the third party administrator acts as a fiduciary when it exercises its discretion.

Similarly, the circuit courts have found – without exception - that a third party administrator, when granted discretionary authority on behalf of an ERISA fiduciary, is also a fiduciary. See, e.g. Prudential Ins. Co. of America v. Doe, 140 F.3d 785 (8th Cir. 1998) (insurer is a fiduciary when it retains final discretionary authority to decide employee's claims); Kyle Railways, Inc. v. Pacific Administration Services, Inc., 990 F.2d 513, 517-18 (9th Cir. 1993) (insurer is a fiduciary when granted discretionary responsibility to make final claims decisions); cf. Terry v. Bayer, 145 F.3d 28 (1st Cir. 1998) (administrator not a fiduciary because plan administrator retained discretionary authority); Flacche v. Sun Life Assurance Co. of Canada; 958 F.2d 730 (6th Cir. 1992)

(administrator not a fiduciary because duties limited to ministerial functions with no discretionary control over plan).

This case law is consistent with cases from this Court which have repeatedly confirmed that one may become a fiduciary, regardless of any formal designation or title, by virtue of the discretion one exercises in the administration of a plan. Pegram v. Herdrich, 530 U.S. 211, 223 (2000); Lockheed Corp. v. Spink, 517 U.S. 882, 890 (1996); Varity Corp. v. Howe, 516 U.S. 489, 502-503 (1996).

In support of her argument that MetLife was not a fiduciary and, therefore, could not exercise discretion under ERISA, Marx focuses on the Administrative Services Agreement ("ASA") and glosses over the Plan provisions which confer discretion on MetLife. Her argument fails for three reasons.

First, the Plan, not the ASA, is the document that Firestone points to for determining whether discretion is granted. Firestone, 489 U.S. at 115. While an ASA might be sufficient to supply discretion where the Plan is silent, it is not sufficient to overcome a clear grant of discretion made under the terms of the Plan. That should be especially clear here where MetLife had discretion under the terms of the Plan and exercised that discretion in rendering a final decision on the claim. Again, both the applicable regulations and case law confirm that MetLife was acting as a fiduciary.

Second, Marx's reliance on a disclaimer of fiduciary status in the ASA is inconsistent with ERISA. Unequivocally, ERISA will not permit a party to escape fiduciary duties through disclaimers or use of titles. 29

U.S.C. § 1110(a) (disclaimer of fiduciary responsibility violates public policy). Instead, the test for fiduciary status is a functional one that depends on discretion over a plan's management, assets or administration. Pegram, 530 U.S. at 223. Thus, if MetLife in fact had discretion, which it did, the language of the ASA will not transform MetLife into a non-fiduciary.

Finally, as the District Court noted, many of the provisions of the ASA confirm that MetLife was, in fact, exercising discretion. Among other things, the ASA identifies actual fiduciary functions for MetLife. For example, Section C.4 of the ASA outlines certain adjudicatory services MetLife will provide including, but not limited to, arranging for independent medical examinations. Such fiduciary functions prove that MetLife was not only granted discretionary authority, but exercised it, despite the disclaimer in the ASA.

3. Principles of Trust Law Do Not Require Deviation From The Arbitrary and Capricious Standard of Review In Light of the Plan's Grant of Discretionary Authority to MetLife

Marx argues that allowing a third party administrator to exercise discretion would be inconsistent with trust law principles and therefore is not allowed under ERISA. Even if MetLife was not acting as a fiduciary in exercising the final decision making authority conferred by the Plan, Marx's extensive reliance on trust law fails under both the statutory provisions of ERISA and Firestone.

First, while ERISA and trust law may be analogous, they are not identical. This concept was underscored in

Mertens v. Hewitt Assoc., 508 U.S. 248 (1993), where the Court addressed the question of whether a non-fiduciary - the plan's actuary – who knowingly participated in the plan's fiduciaries' breach of fiduciary duty could be held liable under ERISA. In its analysis, the Court distinguished ERISA from trust law, pointing out that 29 U.S.C. § 1105(a) contains liability only for co-fiduciaries, which the Court found to be a deliberate omission by Congress of the common law's liability for both co-trustees and third persons. Id. Importantly, the Court emphasized that "vague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text regarding the specific issue under consideration." Id. at 261 (citing Pension Benefit Guaranty Corp. v. LTV Corp., 469 U.S. 633 (1990)).

Marx declares that the lower courts have established precedent that "will undermine the trust law principles inherent in ERISA" and that the Third Circuit's reasoning "subverts the principles of trust law upon which the Supreme Court relied in Firestone." [Petition, p. 10]. But the lower courts neither established unorthodox precedent nor "subverted" the Firestone holding based on trust law: as shown above, trust law and ERISA are not the mirror images that Marx claims.

And, there is no question that the Firestone Court emphasized that discretion could be conferred to either a fiduciary or an administrator. 489 U.S. at 115. The Firestone Court reached this conclusion after examining trust law concepts; therefore, Marx's argument is tantamount to asking the Court to review Firestone in light of trust law concepts the Firestone Court already addressed.

Marx's position is even less persuasive when one considers the Mertens Court's admonition that vague

notions of ERISA's basic purpose will not overcome the statute's provisions. ERISA contemplates that fiduciaries may delegate authority to others to act on their behalf. 29 U.S.C. §1105(c). To the extent MetLife was not acting as a fiduciary (as it was), it plainly was acting under a delegation of authority from the Plan Administrator, a practice which is endorsed by ERISA and therefore not subject to challenge under concepts of trust law. Mertens, 508 U.S. at 261.

B. The Court of Appeals' Decision Does Not Conflict With Other Circuits

As provided in detail above, the Firestone court, aware of the fact that benefit plans have administrators, held that discretionary authority may be granted to administrators. Without exception, lower courts have followed the Firestone court's interpretation of discretionary authority as applied to plan administrators. Thus, the cases Marx cites to support her interpretation of Firestone are cases with distinctly different facts than those presented here.

For example, Marx cites Sanford v. Harvard Indus., 262 F.3d 590 (6th Cir. 2001), and Sharkey v. Ultramar Energy LTD, 70 F.3d 226 (2nd Cir. 1995), to support a conflict in the circuits. However, unlike the facts of this case, in both Sanford and Sharkey, the decisions to deny benefits were made by a party that did not have discretionary authority.

In Sanford, the decision to deny benefits was made by the employer and not the joint management and labor board envisioned by the Plan. Sanford, 262 F.3d at 595. Therefore, because the party with discretionary authority -

the board - did not make the decision to deny benefits, the de novo standard of review applied.

In Sharkey, the issue was a factual one concerning who actually made the decision to deny benefits. 70 F.3d at 230. The Sharkey court found that the plan documents granted a pension committee discretionary authority to act as a fiduciary, but the employee alleged that his employer, not the pension committee, made the decision to deny benefits. Id. The Sharkey court remanded the case to the district court to make the factual determination of which entity denied the claim.

Similarly inapposite to the facts here, in Gritzer v. CBS, Inc., 275 F.3d 291 (3d Cir. 2002), the court found that an administrator with discretionary authority failed to exercise discretion by not responding to a claim for benefits until after the litigation had been commenced. Here, it is undisputed that MetLife responded to the claim. Thus, Gritzer does not confirm any split of authority; indeed, it has little to do with the facts of Marx's case.

Here, MetLife made the decision to deny benefits and had "final" discretion to do so under the terms of the Plan. As the Court of Appeals held, the Plan unambiguously granted discretion to MetLife, which it then exercised in deciding Marx's claim. Therefore the Plan's provisions were followed, and cases like Sharkey and Sanford simply do not apply.

Marx also cites Baker v. Big Star Division of the Grand Union Co., 893 F.2d 288 (11th Cir. 1990), a case where the alleged fiduciary did not have discretionary authority. Id. at 290. Because the administrator was not granted the authority to review benefit denials and make the ultimate decisions regarding eligibility, it could not be a

fiduciary. Id. (noting that the third party administrator had "not been granted the authority to review benefit denials and make the ultimate decision regarding eligibility.")

Again, as explained previously, MetLife had the discretionary authority to review benefit denials and make the ultimate decisions regarding eligibility, and indisputably exercised that authority in deciding Marx's claim. Thus, there is no split of authority for the Court to resolve.

III. CONCLUSION

For the reasons stated above, Respondents respectfully request this Court to deny Petitioner's Petition for a Writ of Certiorari.

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